No. 84555-7
(Consolidated with No. 84764-9)

SUPREME COURT OF THE STATE OF WASHINGTON

TERRY L. WILLIAMS, et ux,

Respondents,

v.

ATHLETIC FIELD, INC., a Washington corporation,

Petitioner.

HOS BROS. CONSTRUCTION, INC.

Appellant,

v.

C19-1 SHOTWELL, LLC, et al.,

Respondents.

RESPONDENT BF-THAR'S BRIEF IN RESPONSE TO AMICUS BRIEF OF AGC OF WASHINGTON

Richard E. Spoonemore
WSBA No. 21833
SIRIANNI YOUTZ SPOONEMORE
999 Third Avenue, Suite 3650
Seattle, WA 98104
Tel. 206.223.0303, Fax 206.223.0246
rspoonemore@sylaw.com
Attorneys for BF-THAR, LLC

Table of Contents

I. INTRODUCTION 1

II. ARGUMENT 4

A. The Question of Whether a Lien Claimant's Form of Lien Complies with the Statutory Requirements is Strictly Construed 4

B. A Lien "Acknowledged Pursuant to Chapter 64.08 RCW" Must Have a Certificate of Acknowledgment Attached to It or it is Not "Acknowledged." 8

C. The Elements of a Proper Acknowledgment Are Derived From the Statutory Forms in RCW 64.08.060-.070 11

D. The Sample Form of Lien Just Sets Forth a Sample Lien, *Not* a Sample Lien *and Acknowledgment Form* 15

E. *Fircrest* Was Decided Before the Legislature Made Acknowledgment A Specific Requirement in 1991. 18

III. CONCLUSION 19

Table of Authorities

Cases

Anderson v. Fry & Bruhn, Inc.
69 Wash. 89, 124 P. 499 (1912) 17

Bank of Commerce of Anacortes v. Kelpine Products Co.
167 Wash. 592, 10 P.2d 238 (1932) 13, 14, 15, 16

Ben Holt Indus., Inc. v. Milne
36 Wn. App. 468, 675 P.2d 1256 (1984) 11, 14, 15, 16

Bradley v. Seattle First Nat'l Bank
34 Wn.2d 63, 208 P.2d 141 (1949) 14, 15, 16

Clements v. Snider
409 F.2d 549 (9th Cir. 1969) 3, 15, 16

Dean v. McFarland
81 Wn.2d 215, 500 P.2d 1244 (1972) 6, 7

DeGooyer v. Northwest Trust & State Bank
130 Wash. 652, 228 P. 835 (1924) 5, 8

Eggert v. Ford
21 Wn.2d 152, 150 P.2d 719 (1944) 3, 17

Estate of Haselwood v. Bremerton Ice Arena, Inc.
166 Wn.2d 489, 210 P.3d 308 (2009) 2, 5, 7

Fircrest Supply v. Plummer
30 Wn. App. 382, 634 P.2d 891 (1981) 4, 18, 19

Flag Const. Co., Inc. v. Olympic Blvd. Partners
109 Wn. App. 286, 34 P.3d 1250 (2001) 8

Forrester v. Reliable Transfer Co.
59 Wash. 86, 109 P. 312 (1910) 2, 10, 11

John H. Sellen Const. Co. v. State Dept. of Revenue
87 Wn.2d 878, 558 P.2d 1342 (1976) 4, 13

Labor Hall Ass'n v. Danielsen
24 Wn.2d 75, 163 P.2d 167 (1945) 11

Lumberman's of Washington, Inc. v. Barnhardt
89 Wn. App. 283, 949 P.2d 382 (1997) ..... passim

Pacific Erectors, Inc. v. Gall Landau Young Constr. Co.
62 Wn. App. 158, 813 P.2d 1243 (1991) 6

Schumacher Painting Co. v. First Union Management, Inc.
69 Wn. App. 693, 850 P.2d 1361 (1993) 6

Smith v. Allen
78 Wash. 135, 138 P. 683 (1914) 10, 11

Town Concrete Pipe of Wash., Inc. v. Redford
43 Wn.App. 493, 717 P.2d 1384 (1986) 6

Tsutakawa v. Kumamoto
53 Wash. 231, 101 P. 869 (1909) 5

Westinghouse Elec. Supply Co. v. Hawthorne
21 Wn.2d 74, 150 P.2d 55 (1944) 5, 8

Williams v. Athletic Field, Inc.
155 Wn. App. 434, 228 P.3d 1297, *review granted*,
169 Wn.2d 1021, 238 P.3d 504 (2010) 15

WR Enterprises, Inc. v. Dept. of Labor & Industries
147 Wn.2d 213, 53 P.3d 504 (2002) 18

Yukon Investments Co. v. Crescent Meat Co.
140 Wash. 136, 248 P. 377 (1926) ..... passim

Statutes

RCW 42.44.010(4) 13

RCW 42.44.100(1) 12, 13

RCW 42.44.100(2) 12, 13

RCW 42.44.100(3) 13

RCW 59.04.010 11

RCW 60.04.060 ..... 1, 4, 13, 18

RCW 60.04.091 18

RCW 60.04.091(2) 1

RCW 60.04.900 ..... 6, 8

RCW 64.04.020 11

RCW 64.04.030 ..... 3, 16

RCW 64.04.040 ..... 3, 16

RCW 64.04.050 ..... 3, 16

RCW 64.08 ..... 2, 3, 19

RCW 64.08.050 ..... passim

RCW 64.08.060 ..... 12, 13, 16

RCW 64.08.070 ..... 12, 13, 16

Treatises

1A C.J.S., ACKNOWLEDGMENTS, § 1 9

Other Authorities

BLACK'S LAW DICTIONARY, 5th Edition, 1979 9

Gillman, Richard, WEST'S LEGAL FORMS, § 1:378 (2009) 15

MERRIAM-WEBSTER'S DICTIONARY OF LAW, 2001 9

I. INTRODUCTION

Prior to 1991, a mechanic could unilaterally seize an interest in real property through a lien that was not acknowledged. RCW 60.04.060 (repealed). Under this statute, a mechanic could obtain a lien by timely recording a lien in the form of the statutory sample which had simply been "subscribed and sworn" before a notary. *Id.*

The legislature, evidencing a concern that property was being improperly encumbered, significantly altered the process with its 1991/1992 revisions to the Mechanic's Lien Statute. Specifically, it "broaden[ed] the significance of the verification statement" and required the claimant to swear under penalty of perjury that the lien was true and correct. *See Lumberman's of Washington, Inc. v. Barnhardt*, 89 Wn. App. 283, 287, 949 P.2d 382, 384 (1997) (discussing revisions). It also, for the first time, required that mechanics' liens "shall be acknowledged pursuant to chapter 64.08 RCW." RCW 60.04.091(2).

The Associated General Contractors of Washington, as *amicus curiæ*, seeks to abolish the legislature's express acknowledgment mandate in order to go back to the pre-1991 system of claiming liens. It advances five principal arguments in an effort to achieve this result, all of which should be rejected.

First, AGC argues that the question of whether a lien was properly created is liberally construed. Its position, however, is

inconsistent with long-standing Washington law, which was reaffirmed by this Court as recently as 2009. *Estate of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 498, 210 P.3d 308, 312 (2009). Whether a form of lien complies with the statutory requirements is strictly construed. *See, e.g., Lumberman's*, 89 Wn. App. at 286.

Second, AGC asserts that the verbal act of "acknowledging" the lien is sufficient, even if there is no "certificate of acknowledgment" appended to it. AGC's argument, however, is inconsistent with RCW 64.08. To be "acknowledged pursuant to chapter 64.08 RCW" requires a certificate under RCW 64.08.050. A long line of cases in Washington, beginning with *Forrester v. Reliable Transfer Co.*, 59 Wash. 86, 95, 109 P. 312 (1910), hold that there is no legal "acknowledgment" without a certificate of acknowledgment appended to the instrument.

Third, AGC claims that RCW 64.08 "says nothing about what an acknowledgment is required to recite." Again, AGC simply ignores long-standing Washington law which explains what a lien claimant "is required to recite" is derived by reference to RCW 64.08's forms. *See, e.g., Yukon Investments Co. v. Crescent Meat Co.*, 140 Wash. 136, 139, 248 P. 377, 378 (1926) (elements necessary for proper acknowledgment are derived by reference to the sample forms).

Fourth, in a theme that runs throughout its brief, AGC argues that a mechanic is only required to follow the sample lien form (what it rhetorically, but inaccurately, characterizes as a "Safe Harbor Form").

AGC, however, fails to understand the difference between an "instrument" and an "acknowledgment to that instrument." An acknowledgment is not a lien; it is what is attached to the lien to authenticate it. *See* RCW 64.08.050 (certificate is "written upon or annexed to the instrument acknowledged"); *Clements v. Snider*, 409 F.2d 549, 550 (9th Cir. 1969) (certificate of acknowledgment is attached to, but not a part of, the instrument acknowledged).

The sample form of lien sets forth sample language for the lien, just as the sample forms for deeds set forth sample language for deeds. *See* RCW 64.04.030 (warranty deed sample form); RCW 64.04.040 (bargain and sale deed sample form); RCW 64.04.050 (quitclaim deed sample form). Neither the sample lien form nor the sample deed forms contains acknowledgment clauses. Following the sample deed forms without an acknowledgment clause has long been held insufficient under Washington law. *See, e.g., Eggert v. Ford*, 21 Wn.2d 152, 154, 150 P.2d 719, 720 (1944). An appropriate acknowledgement clause, contained in RCW 64.08, must be appended to the sample form of deed or lien to validate the instrument.

Finally, in its most transparent effort to return to the pre-1991 version of the statute, AGC argues that Division II should have followed *Fircrest Supply v. Plummer*, 30 Wn. App. 382, 634 P.2d 891 (1981). *Fircrest* did not require acknowledgment. Of course, the mechanic's lien statue in effect at that time did not require it either. *See* RCW 60.04.060 (repealed). This all changed with the 1991/1992 statutory amendments which required that mechanic's liens "shall be acknowledged pursuant to chapter 64.08 RCW." This Court should not simply ignore that express requirement, as AGC seeks here. *John H. Sellen Const. Co. v. State Dept. of Revenue*, 87 Wn.2d 878, 883, 558 P.2d 1342, 1344-45 (1976) ("[W]e presume some significant purpose or objective in every legislative enactment.").

II. ARGUMENT

A. The Question of Whether a Lien Claimant's Form of Lien Complies with the Statutory Requirements is Strictly Construed.

AGC argues that the question of whether a "form of lien" complies with the statutory requirements is to be construed liberally. AGC Mem., pp. 4-6. In advancing this argument, it seeks to distinguish between the questions of "*whether a lien has attached*" and "*whether the form of lien is sufficient.*" AGC Mem., p. 5 (emphasis in original). But, as over a hundred years' worth of case law makes clear, the question of "whether a lien has attached" is

dependent upon strict compliance with the statutory requirements, including whether the form is proper. *See, e.g., Tsutakawa v. Kumamoto,* 53 Wash. 231, 101 P. 869 (1909); *DeGooyer v. Northwest Trust & State Bank,* 130 Wash. 652, 228 P. 835 (1924); *Westinghouse Elec. Supply Co. v. Hawthorne,* 21 Wn.2d 74, 77, 150 P.2d 55, 57 (1944).

This Court's recent decision in *Estate of Haselwood* and the authority it cites, *Lumberman's,* underscores that "attachment" of a lien is itself dependent upon whether the statutory form requirements have been met. *Estate of Haselwood,* 166 Wn.2d at 498 (*citing Lumberman's,* 89 Wn. App. at 286).

In *Lumberman's,* there was no dispute concerning whether the mechanic had, in fact, delivered building material that could have given rise to a lien if the proper form had been used. *Id.* at 285. Rather, the issue was whether a certain form of lien was valid. *Id.* at 284. Specifically, Lumberman's—the mechanic/plaintiff—had filed a lien that lacked a signed verification statement. *Id.* It argued that its lien was nevertheless valid because it substantially complied with the statute. *Id.*

Under the AGC's argument, the fact that Lumberman's had delivered materials and "could have" filed a lien results in liberal construction. AGC Mem., p. 5 ("once it is determined that a lien can attach, the question of lien validity is liberally construed . . . ."). That is not what *Lumberman's*—or any other decision—has held.

On the contrary, because the validity of the form used to create the lien determines whether a lien has attached in the first place, the court held that the strict construction standard applied:

> Although RCW 60.04.900 states that the lien statutes are to be liberally construed to provide security for all parties intended to be protected by their provisions, case law has established that mechanics' and materialmen's liens are creatures of statute, in derogation of common law, and therefore must be strictly construed to determine whether a lien attaches. *Dean v. McFarland,* 81 Wash.2d 215, 219-20, 500 P.2d 1244, 74 A.L.R.3d 378 (1972); *Schumacher Painting Co. v. First Union Management, Inc.,* 69 Wash.App. 693, 698, 850 P.2d 1361, *review denied,* 122 Wash.2d 1013, 863 P.2d 73 (1993); *Town Concrete Pipe of Wash., Inc. v. Redford,* 43 Wash.App. 493, 497, 717 P.2d 1384 (1986). ***One claiming the benefits of the lien must show he has strictly complied with the provisions of the law that created it.*** *Schumacher Painting,* 69 Wash.App. at 699, 850 P.2d 1361; *Pacific Erectors, Inc. v. Gall Landau Young Constr. Co.,* 62 Wash.App. 158, 168, 813 P.2d 1243 (1991), *review denied,* 118 Wash.2d 1015, 827 P.2d 1011 (1992).

Id. at 286 (emphasis added).[1]

---

[1] The court next applied this standard to Lumberman's form of lien, which omitted a signed verification statement, to determine whether it substantially complied with the statutory requirements under the strict construction standard. *Id.* at 288-89. It concluded that the statutory requirements were not met, and that the lien form was invalid. *Id.* at 289 ("Lumbermen's was not in substantial compliance under either the former or the current statute.").

It was this section of *Lumberman's* that this Court referenced in *Estate of Haselwood* for the proposition that the liberal construction of RCW 60.04.900 only applies *after* "it is determined a party's lien is covered by chapter 60.04 RCW":

> Mechanic's and materialmen's liens are creatures of statute, in derogation of common law, and therefore must be strictly construed to determine whether a lien attaches. But ***if it is determined a party's lien is covered by chapter 60.04 RCW***, the statute is to be liberally construed to provide security for all parties intended to be protected by its provisions.

Estate of Haselwood, 166 Wn.2d at 498 (emphasis added).

As a result, to be "covered by chapter 60.04 RCW," the mechanic has the initial burden of proving that it complied with ***all*** of the statutory prerequisites. *Dean v. McFarland*, 81 Wn.2d 215, 219-20, 222, 500 P.2d 1244, 1247-48 (1972) ("[T]he exact phraseology of the mechanics' lien statute is of utmost importance.").

Here, the question is whether the liens filed by the mechanics are covered by the statute, *e.g.*, did the lien claimants do what was necessary to come within the protection of the statute? That is an issue related to lien attachment, and is strictly construed. *Id.* at 220 ("The statutory operation is not to be extended for the

benefit of those who do not clearly come within the terms of the statute.").[2]

B. A Lien "Acknowledged Pursuant to Chapter 64.08 RCW" Must Have a Certificate of Acknowledgment Attached to It or it is Not "Acknowledged."

AGC argues that a mechanic's lien can be valid even if a certificate of acknowledgment is not attached to the lien. Of course, the omission of the certificate undermines the self-authenticating purpose of an acknowledgment. That is why chapter 64.08 RCW itself requires that the person taking the acknowledgment codify that acknowledgement in a certificate attached to the document:

> The officer, or person, taking an acknowledgment as in this chapter provided, ***shall certify the same by a certificate written upon or annexed to the instrument acknowledged*** . . . .

RCW 64.08.050 (emphasis added). AGC simply ignores this statute.

---

[2] *See also Westinghouse Elec. Supply Co.*, 21 Wn.2d at 77 (rule of strict construction applies to determine if lien was created, and only once it is "determined that persons come within the operation of the act it will be liberally applied to them") (*quoting DeGooyer*, 130 Wash. 652); *Lumberman's*, 89 Wn. App. at 286 ("One claiming the benefits of the lien must show he has strictly complied with the provisions of the law that created it."); *Flag Const. Co., Inc. v. Olympic Blvd. Partners*, 109 Wn. App. 286, 289, 34 P.3d 1250, 1252 (2001) ("And we construe RCW 60.04.091 to provide security for those parties the legislature intended the statute to protect. RCW 60.04.900. But the party claiming the benefits of the lien must strictly comply with the lien claims' law.").

As a result, when the legislature mandated that a mechanic's lien "shall be acknowledged pursuant to chapter 64.08 RCW," it not only required that a verbal "acknowledgment" take place, but that such acknowledgment appear in a certificate "written upon or annexed to" the lien as required by RCW 64.08.050.[3]

AGC also accuses Division II of improperly "conflating" the verbal act with the certificate. AGC Mem., p. 7. Division II, however, properly recognized that the act of verbalizing the acknowledgment and codifying it are inseparable. *See* 1A C.J.S., ACKNOWLEDGMENTS, § 1 ("An acknowledgement consists of an oral declaration by the signer of the document ***and a written certificate*** prepared by a public official, generally a notary public."); BLACK'S LAW DICTIONARY, 5th Edition, 1979 ("Formal declaration before authorized official, by person who executed instrument, that it is his free act and deed. ***The certificate of the officer on such instrument that it has been so acknowledged.***"); MERRIAM-WEBSTER'S DICTIONARY OF LAW, 2001 (acknowledgment: "the formal certificate made by an officer before whom one has

[3] AGC is correct when it notes that chapter RCW 64.08 itself does not contain a definition of "acknowledgment," and that the definition appears in RCW 42.44.010(4). AGC Mem., p. 8, n. 2. Significantly, the legislature elected to refer specifically to chapter 64.08 RCW, which contains the express certificate requirement, rather than to RCW 42.44.010(4).

acknowledged a deed including as an essential part the signature and often the seal of the officer").[4]

It has, in fact, long been that the law in this state that without a written certificate of acknowledgment, there is no legal "acknowledgment" at all. *See, e.g., Forrester,* 59 Wash. at 95.

In *Forrester,* this Court was faced with the question of whether a lease without a certificate of acknowledgment could be validated through parol evidence. This Court held that because the statute required a certificate to be "written upon or annexed" to the instrument, parol evidence could not be introduced. The instrument was, as a result, "unacknowledged" as a matter of law:

> We are of the opinion that the acknowledgment of the execution of the lease here involved cannot be proved by parol, nor by other evidence than the certificate of an officer authorized to take acknowledgments written upon or annexed to the lease. ***It follows that we must regard this lease as unacknowledged.***

Id. at 95 (emphasis added). *See also Smith v. Allen,* 78 Wash. 135, 138, 138 P. 683, 685 (1914) ("the law is well settled that acknowledgments cannot be proven by oral testimony, but must be proven by the certificate of the officer before whom the acknowledgment of the execution of the instrument is made.");

---

[4] *See* www.research.lawyers.com/glossary/acknowledgment.html (last visited 5/27/11).

Labor Hall Ass'n v. Danielsen, 24 Wn.2d 75, 89, 163 P.2d 167 (1945) (instrument is "unacknowledged" if it does not have a certificate of acknowledgment); *Ben Holt Indus., Inc. v. Milne*, 36 Wn. App. 468, 472, 675 P.2d 1256 (1984) (defective certificate of acknowledgment may not be perfected by parol evidence, citing *Forrester* and *Smith*).[5]

Washington law therefore recognizes that divorcing the verbalization from the codification of the act in a certificate undermines the whole purpose of an acknowledgment. An instrument is not "acknowledged" if it lacks the proper certificate.

C. The Elements of a Proper Acknowledgment Are Derived From the Statutory Forms in RCW 64.08.060-.070.

AGC boldly states that "RCW 64.08 says nothing about what an acknowledgment is required to recite." AGC Mem., p. 8. AGC makes this statement in the context of arguing that the lien verification language in the sample lien form is really "a 'sufficient' acknowledgment." *Id.* AGC's argument is flawed for two reasons.

First, by asserting that the lien verification language in the sample form is a "sufficient acknowledgment," AGC confuses

---

[5] These cases generally involve acknowledgments under the deed and lease statutes. Like the Mechanic's Lien Statute, they do not refer to "certificates" of acknowledgment. For example, pursuant to RCW 64.04.020, "Every deed shall be in writing, signed by the party bound thereby, ***and acknowledged by the party before some person authorized by this act to take acknowledgments of deeds.***") (emphasis added). *See also* RCW 59.04.010 (acknowledgment of leases).

(1) the verification form that must be signed by the lien claimant with (2) the certificate of acknowledgment that must be signed by the notary. Its confusion is evident when it asserts that "the notary certification declared by Division II as being a required 'acknowledgment' directly contradicts what the legislature provided in the mechanics lien statute as being a sufficient notary certification." AGC Mem., p. 7.

AGC fails to understand that the language at the end of the sample lien form sets forth what the ***lien claimant*** is required to verify, *i.e.,* that the signor knows of the contents of the lien and believes it to be true, not frivolous, made with reasonable cause, and not clearly excessive. *Lumberman's*, 89 Wn. App. at 288-89. In contrast, the acknowledgment is executed by the notary and affirms, *inter alia*, the identity and authority of the individual executing the lien. RCW 64.08.050, .060, .070.

There is no conflict or inconsistency among these sections. The lien claimant signs the verification form, acknowledges the elements required by RCW 64.08 before a notary, and the notary affixes a certificate to the lien in form provided by RCW 64.08.060, RCW 64.08.070, RCW 42.44.100(1) or RCW 42.44.100(2), depending upon whether the lien claimant is a corporation or individual.

AGC also implies that the phrase "subscribed and sworn to before me this __ day of ___" contained in the sample lien form is a type of "acknowledgment." AGC Mem., p. 9. It is not. This

language does not constitute an acknowledgment under RCW 64.08.070, RCW 64.08.060, RCW 42.44.100(1), RCW 42.44.100(2) *or* RCW 42.44.010(4). Rather, the language is a form of "verification upon oath or affirmation" which is not identified as, and actually distinguished from, forms of acknowledgment. *See* RCW 42.44.100(3).[6]

Second, AGC's claim that RCW 64.08 "says nothing about what an acknowledgment is required to recite" is just wrong. As a long line of Washington cases has held, the statutory acknowledgment forms themselves indicate exactly what must be recited. *See* RCW 64.08.060, .070; *Yukon Investments Co.*, 140 Wash. at 139 (elements necessary for proper acknowledgment are derived by reference to the sample forms); *Bank of Commerce of Anacortes v. Kelpine Products Co.*, 167 Wash. 592, 595-96, 10 P.2d 238 (1932)

---

[6] The "subscribed and sworn" language pre-dates the 1991/1992 amendments to the Mechanic's Lien Statute. *See* RCW 60.04.060 (repealed 1992) (reprinted in *Appendix A* to BF-THAR's Mem.). If this was really a "sufficient acknowledgment" for the legislature, then why did it amend the statute to add the phrase "shall be acknowledged pursuant to chapter 64.08 RCW" in 1991? *See John H. Sellen Const. Co.*, 87 Wn.2d at 883 ("Further, the legislature does not engage in unnecessary or meaningless acts, and we presume some significant purpose or objective in every legislative enactment.").

The legislative history indicates that the legislature was not satisfied with the prior level of verification and authentication, and specifically heightened those requirements with its 1991/1992 amendments. *See Lumberman's*, 89 Wn. App. at 287.

(same); *Ben Holt Industries*, 36 Wn. App. at 471-72 (citing *Yukon* and *Kelpine*, court looks to forms set forth in chapter 64.08 RCW to determine elements of proper acknowledgment).

If, as is the case in both *Hos Bros* and *Williams*, a corporation is making the lien claim, then the corporate form of acknowledgment must be used. That form sets forth the "essential elements" of the statutory form for corporations:

> ***The statute ... provides a form of acknowledgment for corporations***. The form used in this case was that commonly provided for individuals, and lacks ***four essential elements of the statutory form for corporations***: (1) fails to show that the person signing the mortgage was known to the notary to be an officer of the corporation which executed the mortgage; (2) that he acknowledged the same to be the free and voluntary act of the corporation; (3) that he was authorized to execute it on behalf of the corporation; and (4) that the seal affixed was the corporate seal.

Yukon, 140 Wash. at 139 (emphasis added). The first three elements are mandatory. *Bradley v. Seattle First Nat'l Bank*, 34 Wn.2d 63, 66-67, 208 P.2d 141, 142 (1949) (first three elements "are actually essential to the validity of the instrument to which the acknowledgment is appended"); *Ben Holt*, 36 Wn. App. at 472 ("*Bradley* merely dropped the requirement of a corporate seal," but all the other elements are still required for valid corporate acknowledgment).

Division II was true to these authorities, and correctly held in *Williams* that the failure to acknowledge each of those elements renders the lien invalid. *Williams v. Athletic Field, Inc.*, 155 Wn. App. 434, 443-45, 228 P.3d 1297, 1303, *review granted*, 169 Wn.2d 1021, 238 P.3d 504 (2010). *See generally* BF-THAR's Mem., pp. 18-26, 31-33; *Yukon*, 140 Wash. at 139; *Kelpine*, 167 Wash. at 595-96; *Bradley*, 34 Wn.2d at 67; *Ben Holt Indus.*, 36 Wn. App. at 472; Gillman, Richard, WEST'S LEGAL FORMS, § 1:378 (2009) ("The use of an individual form for corporate acknowledgment renders the acknowledgment invalid.").

D. The Sample Form of Lien Just Sets Forth a Sample Lien, ***Not*** a Sample Lien ***and Acknowledgment Form.***

AGC suffers from the same misconception that afflicts Hos Bros and Athletic Field: an assumption that an acknowledgment clause is somehow part of the mechanic's lien itself. It is not. An acknowledgment is something that is appended to an instrument that serves, by its existence, to authenticate the instrument. *Clements*, 409 F.2d at 550 ("The function of the certificate of acknowledgment is to provide *prima facie* proof that a document—***to which it is attached but not a part***—has been executed by the person whose signature appears on the document.") (emphasis added).

Washington law, in fact, makes it clear that the acknowledgment certificate is not the instrument itself, but something that is appended to the instrument:

> The officer, or person, taking an acknowledgment as in this chapter provided, shall certify the same by a ***certificate written upon or annexed to the instrument acknowledged*** . . . .

RCW 64.08.050 (emphasis added). *See also Bradley*, 34 Wn.2d at 67 (stating that "***acknowledgment is appended***" to the instrument); *Ben Holt Indus.*, 36 Wn. App. at 472 ("The 'substantial compliance' required by *Yukon* and *Kelpine* dictates that the elements be in writing, ***affixed to the instrument.***").

Compliance with the statute therefore requires two items: (1) a lien, which can follow the sample form (the "instrument") ***and*** (2) an acknowledgment, which can follow the sample forms set forth in RCW 64.08.060-.070, which is then affixed or appended to the instrument. The acknowledgement certificate is not the "lien." It is the language that authenticates the lien. *See Clements*, 409 F.2d at 550.

This is hardly a radical proposition, and has long been the law with respect to deeds. The deed forms, like the sample lien form, set forth sample language to create a proper deed. *See* RCW 64.04.030 (warranty deed form); RCW 64.04.040 (bargain and sale deed form); RCW 64.04.050 (quitclaim deed).

These statutes, like the sample mechanic's lien form, state that the described deed "may be substantially in the following form" or "may be in substance in the following form." *None* of the sample deed forms, however, contains an acknowledgement clause. Washington courts—for good reason—have never held that a deed which only follows the sample form is sufficient to meet RCW 64.04.020's deed acknowledgment requirement. *See, e.g., Eggert*, 21 Wn.2d at 154 ("For example, an instrument, in every other respectfully satisfying the requirements of a deed, except the acknowledgment of the grantor, is not yet a deed, and a statute requiring an auditor to record deeds does not make it his duty to record that instrument."); *Anderson v. Fry & Bruhn, Inc.*, 69 Wash. 89, 92, 124 P. 499 (1912). The sample deed forms are not "safe harbors"—to be valid they must still be acknowledged.

When the legislature sets forth a sample form of an instrument, and additionally requires that such instrument be acknowledged, it is simply requiring that the acknowledgment be attached to the sample form.[7] Contrary to AGC's assertion, the

[7] Nor is it practical to include an acknowledgment clause in the sample forms given that the proper form of acknowledgement will differ depending upon the circumstances (whether a long or short form is used, and whether an individual or corporate acknowledgement is necessary). The sample lien forms sets forth the lien, while the statute's explicit reference to "chapter 64.08 RCW" directs which form of acknowledgement should then be appended to the lien.

legislature was not suggesting that the sample form itself contains an acknowledgment clause. *See also* fn. 5, *infra* (sample form language pre-dates legislature's 1991 amendments which mandate acknowledgment).

E. *Fircrest* Was Decided Before the Legislature Made Acknowledgment A Specific Requirement in 1991.

AGC chastises Division II for not following an opinion from Division I, *Fircrest Supply v. Plummer*, 30 Wn. App. 382, 634 P.2d 891 (1981). AGC Mem., p. 11. In *Fircrest*, the court found that a lien which used the "subscribed and sworn to before me" language was sufficient, notwithstanding problems with the lien's acknowledgment clause. *Id.* at 391.

But *Fircrest* was decided under the old statute, which did not require acknowledgement. *See* RCW 60.04.060 (repealed 1992) (reprinted in *Appendix A* to BF-THAR's Mem.). The legislature changed the law in 1991. *See* RCW 60.04.091. *See also Appendices C, D* and *E* to BH-THAR Mem. (legislative history showing House's addition of acknowledgment requirement, and Senate concurrence, in 1991 bill).

The legislature's decision in 1991 to specifically require mechanics' liens to be acknowledged indicates a change in legislative intent. *WR Enterprises, Inc. v. Dept. of Labor & Industries*, 147 Wn.2d 213, 222, 53 P.3d 504 (2002) ("Further, when a material

change is made in the wording of a statute, a change in legislative purpose must be presumed.").

Division II properly looked to the language of the new statute to determine what the legislature required to create a valid lien, rather than following *Fircrest*, a 1981 decision which arose under the old statutory language.

III. CONCLUSION

AGC would have this Court turn back the clock to the pre-1991 mechanic's lien statute. That is a decision that the legislature can make, if it so chooses. Under the 1991/1992 statute, however, the legislature required mechanic's liens to be properly acknowledged pursuant to RCW 64.08, *et seq.* Neither of the liens at issue here was properly acknowledged, and both lower court decisions voiding the liens should be affirmed.

DATED: June 1, 2011.

SIRIANNI YOUTZ SPOONEMORE

/s/ Richard E. Spoonemore

Richard E. Spoonemore (WSBA #21833)
999 Third Avenue, Suite 3650
Seattle, WA 98104
Tel. 206.223.0303, Fax 206.223.0246
rspoonemore@sylaw.com

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on June 1, 2011, a true copy of the foregoing RESPONDENT BF-THAR'S BRIEF IN RESPONSE TO AMICUS BRIEF OF AGC OF WASHINGTON was served upon counsel as indicated below:

Neil A. Dial Colm P. Nelson Jeffrey G. Frank FOSTER PEPPER, PLLC 1111 Third Avenue, Suite 3400 Seattle, WA 98101 *Counsel for Hos Bros Construction*	[x] [x]	By United States Mail By Email dialn@foster.com nelco@foster.com fraje@foster.com
Todd C. Hayes HARPER HAYES PLLC 600 University Street, Suite 2420 Seattle, WA 98101 *Counsel for Hos Bros Construction*	[x] [x]	By United States Mail By Email todd@harperhayes.com
Joseph E. Shickich, Jr. George E. Frasier RIDDELL WILLIAMS P.S. 1001 Fourth Avenue, Suite 4500 Seattle, WA 98154 *Co-counsel for BF-THAR, LLC*	[x] [x]	By United States Mail By Email jshickich@riddellwilliams.com gfrasier@riddellwilliams.com
Kirk R. Wines Attorney at Law 210 Crockett Street Seattle, WA 98109-2518 *Counsel for Athletic Field, Inc.*	[x] [x]	By United States Mail By Email kirkw@cellslayer.com
John L. O'Brien O'BRIEN LAW FIRM PLLP 175 NE Gilman Blvd. Issaquah, WA 98027-2904 *Counsel for Athletic Field, Inc.*	[x] [x]	By United States Mail By Email jlob@obrienlawfirm.net

Klaus O. Snyder Kelly J. Faust Sovar SNYDER LAW FIRM LLC 920 Alder Avenue, Suite 201 Sumner, WA 98390-1401 *Counsel for Terry and Janis Williams*	[x] [x]	By United States Mail By Email klaus.snyder@sumnerlawcenter.com kelly.faust@sumnerlawcenter.com
Michael P. Grace Daniel C. Carmalt GROFF MURPHY PLLC 300 E. Pine Street Seattle, WA 98122 *Counsel for AGC of Washington*	[x] [x]	By United States Mail By Email mgrace@groffmurphy.com dcarmalt@groffmurphy.com
Robert Sargeant Marshall Ferguson Daniel Ferm WILLIAMS KASTNER & GIBBS PLLC 601 Union Street, Suite 4100 Seattle, WA 98101 *Counsel for Washington Land Title Ass'n.*	[x] [x]	By United States Mail By Email rsargeant@williamskastner.com mferguson@williamskastner.com dferm@williamskastner.com

DATED: June 1, 2011, at Seattle, Washington.

/s/ Richard E. Spoonemore

Richard E. Spoonemore

OFFICE RECEPTIONIST, CLERK

To: Stacy Hoffman
Cc: Neil A. Dial; Colm Nelson; Jeffrey Frank; Todd C. Hayes; Joseph E. Shickich, Jr.; George E. Frasier; Kirk R. Wines; John L. O'Brien; Klaus O. Snyder; Kelly F. Faust Sovar; Michael P. Grace; Daniel C. Carmalt; Rob Sargeant; Marshall Ferguson; Daniel Ferm; Rick Spoonemore
Subject: RE: Consolidated Nos. 84555-7 and 84764-9 - Williams v. Athletic Field, Inc.; Hos Bros. Construction, Inc. v. C19-1 Shotwell, LLC, et al.

Rec. 6-1-11

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Stacy Hoffman [mailto:Stacy@sylaw.com]
Sent: Wednesday, June 01, 2011 11:39 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: Neil A. Dial; Colm Nelson; Jeffrey Frank; Todd C. Hayes; Joseph E. Shickich, Jr.; George E. Frasier; Kirk R. Wines; John L. O'Brien; Klaus O. Snyder; Kelly F. Faust Sovar; Michael P. Grace; Daniel C. Carmalt; Rob Sargeant; Marshall Ferguson; Daniel Ferm; Rick Spoonemore
Subject: Consolidated Nos. 84555-7 and 84764-9 - Williams v. Athletic Field, Inc.; Hos Bros. Construction, Inc. v. C19-1 Shotwell, LLC, et al.

RE: Supreme Court No. 84555-7 – Terry L. Williams v. Athletic Field, Inc.

(Consolidated with No. 84764-9 - Hos Bros. Construction, Inc. v. C19-1 Shotwell, LLC, et al.)

Dear Clerk:

Attached, for filing in the above-referenced case, is Respondent BF-THAR's Brief in Response to Amicus Brief of AGC of Washington.

<<BF-THAR's Response to AGC's Amicus Brief.pdf>>

Richard E. Spoonemore

WSBA #21833
SIRIANNI YOUTZ SPOONEMORE
999 Third Avenue, Suite 3650
Seattle, WA 98104
Tel. (206) 223-0303
Fax (206) 223-0246
Email: rspoonemore@sylaw.com

Attorneys for Respondent BF-THAR, LLC

Sent by:
Stacy Hoffman, Legal Secretary
SIRIANNI YOUTZ SPOONEMORE
999 Third Avenue, Suite 3650
Seattle, WA 98104
Tel. (206) 223-0303
Fax (206) 223-0246
Email: stacy@sylaw.com